Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	MM Docket No. 98-198
	)	
Amendment of Section 73.202(b)	)	RM-
Table of Allotments	)	
FM Broadcast Stations	)	
(Cross Plains, Texas)	)	

ORIGINAL

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

REPLY TO OPPOSITION TO MOTION TO STRIKE

On January 20, 1999, WBAP/KSCS Operating, Ltd., and Blue Bonnet Radio, Inc. (hereinafter "WBAP-BBR") filed an unauthorized pleading in this proceeding entitled "Statement for The Record" in which it sought to augment its earlier Comments by "clarifying" them with additional representations and arguments. Although the "Statement for The Record" was clearly an unauthorized pleading, not contemplated nor allowed under FCC rules, WBAP-BBR simply filed it without any showing of good cause or separate Motion for Leave to File. On January 29, Gulfwest Broadcasting Company and Sonoma Media Corporation, joint petitioners herein (hereinafter "Gulf-Sonoma"), filed a Motion to Strike the unauthorized pleading.

On February 17, 1999, WBAP-BBR filed its Opposition to that Motion to Strike, to which this Reply is directed. As noted below, the Opposition is grossly untimely, again with no Motion for Leave to accept the untimely pleading, and is also substantively devoid of merit, with no explanation at all as to

why WBAP-BBR should be allowed to file an additional pleading to seek to cure the fatal defect of its original pleadings, and for those reasons the Opposition, as well as the Statement for the Record, should be rejected and WBAP-BBR's Counterproposal dismissed as inherently and patently defective.

I. The Opposition was filed Out Of Time And Should be Dismissed as Procedurally Defective.

Gulf-Sonoma's Motion to Strike was filed on January 29, 1999. Such Motions are governed by FCC Rule 47 CFR 1.45 which provides that ...pleadings filed in Commission proceedings **shall** be filed in accordance with [this rule]..." (emphasis supplied). At 1.45 (a) the rule states that

> Oppositions to an Motion...may be filed within 10 days after the original pleading is filed.

In addition, rule 47 CFR 1.4(h) provides an additional 3 days if the original pleading was served by mail, which it was. That is it. Those are the FCC rules that govern the filing of an Opposition pleading. The rules are not complex and they are easy to apply. The Motion was filed on January 29. The ten day period provided under rule 1.45(a) ran to Monday, February 8. The additional 3 day period provided by rule 1.4(h) provided a final filing date of Thursday, February 11. Any Opposition was required to be filed by that date.

Once again, WBAP-BBR simply chose not to comply with FCC rules and chose instead to file its Opposition on February 17, six days after the filing deadline. And again, while ignoring the rule, WBAP-BBR did not even ask for leave to file out of time.

Gulf-Sonoma's original Motion to Strike was premised upon the fact that WBAP-BBR had no right to simply file an additional pleading in this proceeding in some vain attempt to slap a blowout patch on its fatally defective counterproposal, and that it was a violation of the rights of every other party to allow WBAP-BBR to seek to unilaterally seek to augment its defective proposal by the simple expedient of filing another pleading, one which no one else, according to FCC rules, had any right to file. The fact that it simply "did so" because it wanted to, without even trying to make a "good cause showing" to support such an unusual action 1/ simply compounded the patent unacceptability of WBAP-BBR's actions.

Having made that argument in the Motion to Strike, we are confounded that WBAP-BBR would so arrogantly do it all again here, <u>again</u> simply ignoring the Commission's rules, filing what it wanted to, when it wanted to, and, having failed to comply with the rule, not even bothering to <u>ask</u> that it be allowed to file its pleading 6 days late. Do none of the FCC rules apply to WBAP-BBR? Are they not required to include the commitment of the licensee to build a station on the frequency change being requested within their Counterproposal? Can they just add that later on? Are they allowed to file additional pleadings not authorized by the FCC rules to any other party? Can they file

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1/ Although we can well understand that seeking to repair a defective proposal does not constitute "good cause" for WBAP-BBR, and there are obviously no other arguments available to WBAP-BBR upon which to support such a request, that still did not absolve them from at least trying to offer "good cause".

their pleadings at any time convenient to them in total disregard to the Commission's rules which govern such filings?

We suggest that the repeated rule violations by WBAP-BBR have become outrageous and that its Opposition should be dismissed as procedurally defective, untimely and contrary to the clear requirements of FCC rule 1.45.

II. The Opposition Is Devoid of Any Substantive Basis Upon Which the "Statement For The Record" Should be Allowed as An Additional Pleading By WBAP-BBR in This Proceeding.

The first thing argued by WBAP-BBR is that its Statement for the Record "...did not make any new arguments, nor is it disruptive, or prejudicial". Perhaps WBAP-BBR might be excused for being a little bit less than objective in making that statement. Or perhaps they were referring to some other "Statement" for some other "Record". In any event, wishing will not make it so. The Commission is well qualified to judge if attempting to add in a commitment to build by the licensee that was not present in the WBAP-BBR Counterproposal just might be considered as a "new argument". The Commission may also take note that the Statement for the Record was three pages long and that after seeking to repair its own fatal flaw, WBAP-BBR could not help but throw in a few "gratuitous comments" of its own against Gulf-Sonoma and another party in this proceeding. But then again, when you get to file an extra pleading and no one else can, why not? It's a free shot. And that is exactly why there are rules that govern these proceedings, why allowing an extra pleading to

WBAP-BBR is per se prejudicial to every other party in this case, and why the Statement for the Record must be rejected. 2/

It has long been FCC policy to not allow additional pleadings by one party in a contested proceeding and WBAP-BBR has made no showing whatsoever why it should be allowed to do so here. As stated by the FCC Review Board in Guy S. Erway, 40 FCC 2d 1071, 1074 (1973): "Orderliness, expedition, and fairness in the adjudicatory process require that reasonable procedural limits be established and maintained". WBAP-BBR has offered absolutely nothing to support its position that the rules which apply to everyone else should not apply to them.

At paragraph one of the Opposition, WBAP-BBR argues that the expression of interest by the speculator should be sufficient and that an expression of interest by the licensee, the very party whose station whose channel classification would be changed and whose city of license would be changed, is not required. That there is no need for the licensee to submit its own commitment to these major changes to the FCC since, according to WBAP-BBR, the expression of interest of an option holder should be good enough. Without trying to belabor the obvious, an Option holder is just that.. an option holder..., someone who may, if it chooses to, buy the station sometime in the future. If it suits the plans of the option holder at that time, if the market is still looking

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2/ Obviously, if it were acceptable for WBAP-BBR to file an additional pleading to cure its own fatal defect, then fairness would require that everyone else also be allowed an extra pleading to supplement their own cases as they may choose.

good, if broadcasting is still attractive to them, if they want to. They are an option holder speculating as to what may or may not happen in the future and nothing more.

To state the obvious, WBAP is not the licensee of the station and, as such, does not have the power or authority to commit that station to do anything, to change its channel classification, change its city of license or anything else. Only the licensee can do that. The "commitment" offered by WBAP is that IF the FCC makes the enormous number of changes requested in their counterproposal, and IF WBAP is still interested when that happens, and IF they are still interested enough to exercise their option to buy the station then, then WBAP may honor their commitment. The fact is that up to, and until, that time in the future that WBAP may choose to buy the station from BBR, BBR remains the licensee of the station and ONLY BBR can commit that station to do anything. And Blue Bonnet Radio **DID NOT.**

If WBAP should choose to quit at any time between now and any future time, for ANY reason good and sufficient to **them** (not the FCC), that is their right. And without the commitment and specific expression of interest by the licensee, where would that leave the FCC? That is what speculation is. WBAP could have bought the station and made its own proposal, but it did not, purposely leaving itself room to quit and run at any time by way of its option. It preserved its right to do so and if it did, "never mind" would be more than a little insufficient to explain the loss of FCC time, money, and effort that would result from

that scenario. For WBAP-BBR to now claim (yet more new arguments from WBAP-BBR) that there is no need for the expression of interest by the licensee is an absurd statement born of desperation.

Surely WBAP-BBR should know that it is ONLY the licensee or permittee of a station that can make such a commitment to change the station facilities in the first instance and that WBAP, being neither licensee nor permittee of the station, was not even eligible to request such an upgrade. See 47 CFR 1.420(g)(3), note 1 and the Commission's decisions in Lafayette, Louisiana, 4 FCC Rcd 5073 (1989) and Santa Margarita, California, 2 FCC Rcd 6930 (1987). Clearly the Commission has recognized the addition of proposed assignees of stations requesting such changes as a supplement to the essential proposal and commitment of the licensee itself, the idea being that upon FCC approval of such a transfer, the original licensee may then transfer its petition and commitment to its successor in interest, there being no break from the original commitment of the licensee to the commitment of the successor licensee. The situation with WBAP-BBR is that there was no original commitment by the licensee, only the illusory, secondary "commitment" of an option holder who may or may not choose to exercise its option in the future.

It was the commitment of the existing licensee, Blue Bonnet Radio, that was essential here, and absent that original commitment by the licensee, there is nothing to rely upon at the present time, and nothing to transfer to WBAP in the future, even

if it should decide to exercise its option then. There is a fatal absence of the present commitment by the present licensee, the only one that could make such a commitment upon which to support changes in the existing station.

WBAP-BBR's new argument that the express stated commitment of the licensee was not really necessary here and that WBAP-BBR could somehow sublimate beyond that point to its own speculative statement as to what it might do sometime in the future just in case it might then decide to buy the station in question is contrary to all the law and all the cases. The simple fact is that it did not include the expression of interest of the licensee as required, supplying instead a specific statement by both the licensee and the speculator together agreeing that only the speculator was offering an intention to build the station (and then only if the speculator decided it was in its interest at that future time to exercise its option and buy the station), they cannot really add it in now, and so all that is left to them is to argue that it really isn't necessary. That is pitifully lame and unpersuasive.

The absurdity of the new position by WBAP-BBR is even more profound when measured against their prior actions. After all, it was important enough for them to file a Statement for The Record for the specific purpose of attempting to add the expression of interest of the licensee to their case. If it really wasn't that important and really isn't all that necessary, then why did they

file the Statement for the Record in the first place? WBAP-BBR seemed to think it was pretty important there.

Having thus floated its new "it isn't really necessary" argument, WBAP-BBR then returns in paragraph 2 to its claim that, even though it's now "not really necessary', the fatal omission in the Counterproposal was really corrected by WBAP-BBR simply adding it to their counterproposal by way of the additional pleading entitled "Statement For the Record". That is no more appropriate or cognizable here than when first offered in the "Statement for the Record".

In the balance of its Opposition, WBAP-BBR again states its position that its additional pleadings are not really prejudicial since in WBAP-BBR's opinion, everyone else has such terrible defects. We would only note that no one else had such terrible defects that they felt constrained to try to "clarify their cases" by filing extra pleadings to repair fatal defects such as filed by WBAP-BBR. The repeated negative statements by WBAP-BBR in its original Statement for the Record as well as its Opposition are clearly additional arguments by WBAP-BBR which only serve to underscore the the patent unacceptability of those pleadings.

Lastly, as to the circumstances that surrounded the "decision" of Equicom to withdraw its written agreement to cooperate with Gulf-Sonoma (pages 8-10 of Gulf-Sonoma's Motion to Strike), those statements stand as offered and we would suggest that further inquiry by the Commission of the actions of WBAP-BBR

in this matter would soon establish whether they were "ridiculous assertions" or not. In fact, a simple request to Equicom for a statement as to what WBAP-BBR represented to them to "convince" Equicom to withdraw its agreement with Gulf-Sonoma would probably suffice to establish who is truly a "desperate party" here. We would welcome such an inquiry. WBAP-BBR apparently would not and we do not find that to be surprising.

III. Conclusion

Wherefore, it is respectfully submitted that the "Opposition to Motion To Strike" filed by WBAP-BBR is procedurally defective and should be dismissed on that basis alone. Moreover, it includes no substantive argument to rebut the Motion to Strike the unauthorized pleading of WBAP-BBR and that pleading should be stricken and given no consideration in this proceeding.

Respectfully Submitted,

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March 1, 1999

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing "Reply to Opposition to Motion to Strike" have been served by United States mail, postage prepaid this 1st day of March, 1999, upon the following:

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